UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 03-00817
	)	Chapter 11
HAWAIIAN AIRLINES, INC.,	)	
	)	
Debtor.	)	
	)	

MEMORANDUM DECISION ON MOTION TO COMPEL PRODUCTION AND CROSSMOTIONS FOR PROTECTIVE ORDER

On November 18, 2003, Hawaiian Holdings, Inc., AIP, LLC, John W. Adams, Smith Management LLC, and SDR Group Holdings, Inc. (collectively "Holdings") filed a motion for (1) an order compelling production of the documents requested in various subpoenas duces tecum (the "Subpoenas") issued September 19, 2003, and in an order issued by the clerk of this court on September 23, 2003 (the "Rule 2004 Order") and (2) a protective order. The Trustee filed a timely opposition to the motion and a crossmotion for a protective order. BCC Equipment Leasing ("BCC"), a major creditor that claims a confidentiality interest in certain of the documents sought by Holdings, also responded to the requests for a protective order. Following a hearing on December 1, 2003, the court took the matter under advisement.

Hawaiian Holdings, Inc., owns all of the stock of the debtor. AIP, LLC, Mr. Adams, Smith Management, LLC, and SDR Group Holdings, Inc., are

all affiliated with Hawaiian Holdings, Inc., and some of them may have creditor claims against the debtor.

The Trustee argues that Holdings is not entitled to conduct discovery at all and that, if any discovery is permitted, the proposed discovery is excessive and should be stayed. Both parties agree that a protective order is appropriate but disagree on the terms.

I. Holdings' Right to Conduct Discovery

Holdings seeks to conduct discovery because the Trustee moved for authority under section 1113[1] to modify the debtor's obligations to fund a pension plan benefitting its pilots, represented by the Air Line Pilots Association ("ALPA"). Holdings wishes to conduct discovery related to the section 1113 issues because modification of the pension plan will affect the debtor's prospects for reorganization and because Holdings could be liable if the Trustee fails to make all required payments to the plan.

The Trustee argues that Holdings should not be permitted to conduct this discovery because Holdings lacks standing to object to the Trustee's request under section 1113. The Trustee is incorrect. Holdings is a party in interest that is

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[1] Unless otherwise indicated, all section references are to the Bankruptcy Code, 11 U.S.C. §§101 et. seq. (West 2003), and all rule references are to the Federal Rules of Bankruptcy Procedure.

entitled to "raise and . . . appear and be heard on any issue" in a chapter 11 case. 11 U.S.C. § 1109(b). The right to appear and be heard could become hollow if a party were completely precluded from conducting discovery. While a party's discovery rights should be determined in light of (among other factors) the extent to which the relief sought would affect that party, Holdings should be permitted to conduct discovery on the section 1113 issues at an appropriate time and to an appropriate extent.

The Trustee also argues that Holdings is not entitled to conduct discovery on the section 1113 dispute because section 1113(b)(1)(B) requires the trustee to provide "relevant information" only to the representative of the affected employees. The Trustee contends that Congress did not intend for other parties to receive such information. This argument is inconsistent, however, with section 1113(d)(3), which authorizes the court to enter protective orders restricting the disclosure of information provided to the employees' representative. If no one other than the employees' representative were entitled to such information, the subsection providing for protective orders would be unnecessary.

Further, section 1113(b)(1)(B) applies to the collective bargaining process that generally must precede a trustee's attempt unilaterally to modify a collective bargaining agreement. If that bargaining process is successful, the court

must approve the resulting agreement. If the bargaining process fails, the court must approve an application for rejection of the collective bargaining agreement. 11 U.S.C. § 1113(c), (d). In either event, parties in interest are entitled to appear and be heard on the issue of whether the court should approve the modification or rejection of the collective bargaining agreement. The parties' discovery rights in the litigation process are not limited by the trustee's obligation to provide certain information to the union during the bargaining process.

Holdings contends that it may propose a plan of reorganization and that it requires extensive and detailed information about the debtor's financial condition and prospects in order to formulate a plan and prepare the requisite disclosure statement. The Trustee does not deny that Holdings is entitled to conduct discovery for this purpose. Rather, the Trustee argues that Holdings' requests are overbroad and premature. These contentions are addressed below.

II. The Timing of Discovery

The Trustee's arguments concerning the prematurity of Holdings' requests are well taken.

As required by section 1113, the Trustee and ALPA are negotiating a potential modification of the ALPA pension plan. The Trustee is correctly concerned that the negotiations could be more difficult and less likely to succeed if

third parties are looking over the shoulders of the Trustee and ALPA. Further, the discovery will be better focused and less wasteful if it is conducted after, rather than before, the Trustee and ALPA have reached either an agreement or an impasse. Thus, a stay on the discovery related to the section 1113 issues is appropriate. If necessary, section 1113(d) allows the court to extend the hearing on the Trustee's motion to permit all parties an adequate opportunity to conduct discovery (subject to the time restrictions set forth in section 1113(d)).

Likewise, a stay of discovery is appropriate on the plan formulation issue. Certain issues must be resolved before any party could propose a meaningful plan of reorganization. All parties seem to agree that the aircraft leases must be satisfactorily renegotiated before one could intelligently formulate a plan. The Trustee argues that renegotiation of the ALPA pension plan is also a critical prerequisite to a successful reorganization. Therefore, a limited stay of discovery will not materially delay the conclusion of this case.

There will be a further discovery conference on January 23, 2003, at 10 o'clock a.m. All discovery is stayed until the conclusion of that conference (or such later date as the court may order).

III. The Scope of Discovery

The dispute concerning the scope of discovery requires separate consideration of each of Holdings' discovery requests.

A. The Subpoenas

1. Paragraphs 1-3. Holdings acknowledges that the documents in paragraphs 1 through 3 of the Subpoenas have been produced.

2. Paragraphs 4-6. Paragraphs 4 through 6 of the Subpoenas request production of certain documents that the debtor or the Trustee provided to ALPA between January 1, 2002 and the present. The Trustee objects to these requests on the ground of overbreadth. The Trustee has not demonstrated that it would be unduly burdensome to produce communications of the debtor or the Trustee with a particular party during a particular time period. The Trustee also objects to these requests on relevance grounds. Holdings seeks to compare the financial information that the debtor provided to ALPA in the past with the information provided by the Trustee at this time and to determine which set of information is more reasonable and reliable. These documents are reasonably calculated to lead to the discovery of admissible evidence and are discoverable.

3. Paragraph 7. Paragraph 7 of the Subpoenas requests "All DOCUMENTS concerning, related to or reflecting the past, present or projected future business operations of, or the past, present or projected future financial

condition of, HAWAIIAN AIRLINES . . . ." The Trustee correctly argues that this request is overbroad. Read literally, it would require the Trustee to produce virtually every piece of paper and every computer record held by the debtor's accounting and bookkeeping departments (and probably other departments). The Trustee has agreed to produce certain weekly reports in response to this request. This production is sufficient for the time being. (More extensive discovery may be appropriate at a later stage of the case.)

4. Paragraph 8. The parties have apparently resolved the dispute concerning paragraph 8 of the Subpoenas.

5. Paragraphs 9-16. Paragraphs 9 through 16 of the Subpoenas requests "All DOCUMENTS supporting, or upon which the Trustee relied in making," certain statements in a declaration and a reply memorandum that the Trustee filed in court. The Trustee objects to the request for all documents "supporting" those statements on overbreadth grounds. The Trustee represented that he produced all documents upon which he relied in making the identified statements. For present purposes, this request is denied.

6. Paragraph 17. Paragraph 17 of the Subpoenas requests "All DOCUMENTS referring or relating to or constituting communications between HAWAIIAN AIRLINES or the TRUSTEE . . ., on the one hand, and the

PBGC, on the other hand, with respect to" certain identified topics. The documents which "constitut[e] communications" are within the scope of "discovery relevance" and the Trustee has made no showing of an undue burden. The request for documents that "refer[] or relat[e]" to the identified topics is overbroad for present purposes.[2]

7. Paragraph 18. Paragraph 18 of the Subpoenas requests that the Trustee produce all documents that support a statement, found in a letter that the debtor in possession sent to ALPA prior to the appointment of the first trustee, that the debtor intended to make certain payments to the ALPA retirement plan. The Trustee need not produce documents to support a statement that he did not make or authorize and that he contends is not binding upon him.

Paragraph 18 goes on, however, to request that the Trustee produce all documents upon which the Trustee relies in contending that the debtor did not have a contractual obligation to make certain payments to the ALPA pension plan. This request goes directly to one of the Trustee's assertions and is therefore within the scope of discovery.

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[2] The Trustee argues that discovery should not be permitted because Holdings is already fully informed on this topic. A party may, however, propound discovery in order to find out what its opponent knows, regardless of what the proponent already knows.

8. Paragraph 19. Paragraph 19 of the Subpoenas requests production of documents that refer or relate to any effects that Holdings will suffer if the Trustee does not make payments to the ALPA plan. The Trustee represented at the hearing that the Trustee has no such documents. Further, this request is not likely to lead to relevant evidence. The decision to approve an assumption, rejection, or modification of an executory contract depends upon whether the bankruptcy estate will benefit. Adverse consequences to third parties are irrelevant (except perhaps in extraordinary circumstances). The Trustee need not produce documents related to this discovery request.

9. Paragraph 20. Paragraph 20 of the Subpoenas requests production of communications between the Trustee and the Official Unsecured Creditors Committee concerning the section 1113 issue. The Trustee argues that permitting Holdings to conduct this discovery would chill his dealings with the Committee which are essential to the success of this case. This is an important consideration. The same underlying information will probably be produced in response to other requests. Therefore, this request is denied.

10. Paragraphs 21-22. There apparently is no dispute concerning paragraphs 21 and 22 of the Subpoenas.

B. The Rule 2004 Order

1. Paragraphs 1-2. Paragraph 1 of the Rule 2004 Order requests a schedule of all information that the Trustee has provided or will provide in the future to the Committee. Paragraph 2 requests copies of the materials themselves.[3] The Trustee objects because these requests represent an unwarranted intrusion upon his discussions with the Committee and may reduce the candor and productivity of those discussions. The Trustee's objection presents a valid concern. The committee of unsecured creditors plays a special role in a chapter 11 case. Open communication between the trustee and the committee is essential. Requiring simultaneous disclosure of those communications to a third party, with which both the Trustee and the Committee have adversarial relationships, would hinder both the Trustee and the Committee in the performance of their respective

[3] Paragraphs 1-4 request, not only information and documents previously provided, but also information "being provided on a going forward basis . . . ." The Trustee argues that there is no authority for a "continuing" request of this kind. I disagree. Nothing in the rules forbids such a request. To the contrary, Fed. R. Civ. P. 26(e) broadly requires parties to supplement or correct prior discovery responses which are "incomplete or incorrect." Rule 26(e) is applicable to adversary proceedings by virtue of Fed. R. Bankr. P. 7026 and contested matters by virtue of Fed. R. Bankr. P. 9014(c). Even if rule 26(e) does not directly govern examinations under rule 2004, its principles nevertheless provide useful guidance. Therefore, I conclude that a request for a continuing production of documents as they are created is not per se impermissible.

duties. Further, Holdings is not prejudiced because it can probably get the same underlying information by asking for it directly. The request is denied.

2. Paragraphs 3-4. Paragraphs 3 and 4 request all weekly and monthly financial reports. (The parties apparently both understand exactly what reports are requested.) The request includes "monthly operating reports" that the Trustee is required to file in court and that are available to Holdings and the public. An order compelling the production of documents that are part of the record in this case and readily available to Holdings in not necessary. The weekly reports should be produced, however. There is no showing that production of the weekly reports would be unduly burdensome, and a protective order should resolve any confidentiality concerns.

3. Paragraph 5. Paragraph 5 requests "management's current business plan." The Trustee's counsel represented at the hearing that he produced the most current business plan, including supporting information. The request for "all documents concerning, regarding, referring or relating to" the current business plan is ambiguous and overbroad. The request is denied.

4. Paragraphs 6,8, 9. Paragraphs 6, 8, and 9 request aircraft leases and related documents. The Trustee is apparently willing to produce these documents under an appropriate protective order (discussed below).

5. Paragraphs 7, 10, 11. Paragraphs 7, 10, and 11 ask for documents pertaining to employee benefit plans and collective bargaining agreements. The Trustee does not claim that these documents are confidential and contends that all such documents have been produced. Holdings argues that the production has not been complete. This is an appropriate subject of discovery but there is insufficient information to determine whether the documents were produced.

C. Privileged Documents

This order does not determine whether any documents are privileged. If the Trustee claims that any documents covered by this order are privileged, the Trustee must prepare and serve an appropriate privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

IV. Protective Order

The parties agree that a protective order is necessary but have failed to agree upon the terms of such an order. Holdings and the Trustee have each submitted proposed orders that differ in countless ways. (BCC has stated that it concurs with the Trustee's proposal.) The Trustee, Holdings, and BCC are directed to attempt again to agree upon a protective order, based on the following principles:

1. Holdings suggests that the protective order ought to be applicable to all discovery, all parties, and all disputes in this case. The Trustee and BCC argue, however, that this approach does not adequately protect the varying confidentiality interests in different documents. The Trustee's position prevails because some documents (for example, the aircraft leases and other documents reflecting aircraft lease pricing) are more sensitive, and implicate the confidentiality interests of more parties, than others.

2. The Trustee proposes that all discovery will be deemed confidential unless otherwise designated. Holdings proposes that particular documents will be confidential only if a party designates them as such. Holdings' approach is preferable. The producing party should be required to determine in good faith and in advance whether a particular document is confidential.

3. Holdings proposes that confidential information can be shown to the attorneys in the law firms that represent Holdings and who are working on the case. The Trustee would limit disclosure to attorneys who are admitted to practice before this court or have been authorized to appear pro hac vice and who are working on the case. Although the Trustee's proposal would enhance the court's revenues (because a fee is payable with every pro hac vice application), the

additional limitation is not necessary to protect the confidentiality of the information.

4. The Trustee proposes that confidential information can be shown to directors, officers, and trustees of the parties. Holdings would expand this to include members and employees of the parties. Because analysis of the discovery information may require the assistance of persons who work for a party at a lower level than that of an officer or director, Holdings' proposal is appropriate. (Paragraph 5 section a of Holdings' proposed order and paragraph 11 section a of the Trustee's proposed order, which are substantially identical, both provide that such distribution may only be made on a "need to know" basis.)

5. Both proposals permit the disclosure of confidential information to consultants and expert witnesses who receive a copy of the order and sign a confidentiality agreement. The Trustee's proposal provides that the signed confidentiality agreement must be sent to all parties to the protective order. Holdings' proposal provides that the party who retained the consultant or expert retain the signed agreement. Holdings argues that the parties should not be required to reveal who they have retained as consultants or experts unless and until the rules otherwise them to do so. The Trustee's proposal is appropriate. Parties

who produce confidential information are entitled to know, in advance, to whom it is being disclosed.

6. Holdings' proposal permits the disclosure of confidential information to witnesses during their testimony and prior to their testimony to the extent necessary to prepare for testimony. This is appropriate but the order should require advance notice to the other parties.

The Trustee, Holdings, the Committee, and BCC are directed to attempt again to reach agreement on a protective order based on the above principles and to submit, not later than January 15, 2004, a proposed stipulated protective order or, if the parties cannot agree, alternative proposed orders.

DATED: Honolulu, Hawaii, December 19, 2003.

/s/ Robert J. Faris
United States Bankruptcy Judge

HAWAIIAN AIRLINES, INC.
BK. No. 03-00817

Service List of Parties Appearing at the 12/1/03 Hearing on
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(Prepared by Gelber, Gelber, Ingersoll & Klevansky)

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CERTIFICATION OF SERVICE
I HEREBY CERTIFY THAT THE ATTACHED ORDER/JUDGMENT WAS MAILED ON 12/22/03, TO THE ABOVE NAMED PARTIES IN INTEREST.

C. Takenaga
DEPUTY CLERK